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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-204

JUDICIAL COUNCIL OF THE THIRD CIRCUIT,
Petitioner,

v.

JOSEPH M. NOLAN,
Respondent.

REPLY TO PETITIONER JUDICIAL COUNCIL'S REPLY BRIEF

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Petitioner Judicial Council in its reply brief alleges that the pending matter was, "in no sense a case which came to be handled by the Department of Justice attorneys in the ordinary course of business" (P. 2). It is respectfully submitted that the request by the Judicial Council for representation by the Department of Justice *was* in the ordinary course of business and was made in compliance with Title 28 U.S.C.A., Section 516. It is also submitted that when the Solicitor General's office notified the Court of its intention to withdraw, the proper

procedure would have been for the Judicial Council to request the Attorney General to appoint a special attorney to represent it as permitted by 28 U.S.C.A. 515(a).

The main thrust of the Council's argument is that 28 U.S.C.A., Section 516 is applicable only to litigation of the Executive branch and the activities of the several United States attorneys. The Council concludes with the comment that the statute has no necessary relationship to the unusual cases on which the Attorney General may be called upon to furnish representation to the Judiciary or to the Congress. This conclusion is not supported by the existing case law. In *Meredith* v. *Van Oosterhout*, 286 F. 2d 216 (C. A. 8th, 1960), *cert. denied* 365 U. S. 835 (1961), the Court considered an action filed against a United States Circuit Court judge. The Court commented that the Attorney General of the United States had been duly authorized to represent the Circuit Court judge, and in direct answer to objections filed by the plaintiff in that case against the representation of the Circuit Court judge by the United States Attorney, made the following statement:

> "In the instant case the United States was, of course, interested and concerned in a civil action brought against a judge of one of its courts for acts performed in his official capacity. The Attorney General exercising the discretion vested in him by the foregoing, authorized and directed the United States Attorney for the Southern District of Iowa to appear for and represent the appellee herein." (*Id.* at pp. 219-20)

See also *Booth* v. *Fletcher*, 101 F. 2d 676 (C.A. D. C. 1939), *cert. denied* 307 U. S. 628. The Court in the *Booth* case stated:

> "It is not even a doubtful question whether the appearance of these officers was proper in the present case." (*Id.* at 679).

See also *Weiss* v. *Bonsal*, 344 F. 2d 428 (C.A. 2, 1965), affg. *Weiss* v. *Morgenthau*, 233 F. Supp. 307 (S.D. N.Y. 1964), where the District Court stated:

> "It is unquestioned that the United States is 'interested' in a suit against a Judge of the United States District Court charging malfeasance in the execution of his duties." (*Id.* at 308).

The present matter relates to a review of an official act of a judicial council. It makes no material difference whether these acts are regarded as judicial in nature or administrative. The important question is that it was an official act, and the United States is interested and concerned when the acts are performed by its officers or agents in an official capacity. The cases cited under this statute do not distinguish between branches of government, but turn on the critical question of whether the act was performed by an officer of the United States in his official capacity. To sustain petitioner's argument that the statute does not apply to it, the argument would have to be carried to its logical conclusion, i.e. that no public rights are involved and that the acts of the Judicial Council are private, not public or official. The analogy drawn to the *Chandler* case by the Council is inappropriate. Respondent did not argue that the Attorney General should have represented both Judge Chandler and the Judicial Council. Judge Chandler instituted his action to protect his status as a public official, and he attempted to review the official acts of a judicial council who was represented by the Solicitor General's

office. It is obvious that there would have been no basis for the Attorney General to represent Judge Chandler.

The petitioner then attempts to create another straw man. It points to situations where the United States might institute mandamus proceedings against a federal judge. In that situation, the Attorney General should, pursuant to the statute, designate an independent attorney to represent the judge where his office continues to represent the government.

There is no reason in the instant case why the Judicial Council could not have requested the Attorney General to designate an independent attorney pursuant to 28 U.S. C.A., Section 515(a), and it is surprising that they have failed to do so.

Petitioner wishes to call to the Court's attention the decision of Judge Learned Hand in *Sutherland* v. *International Ins. Co. of New York*, 43 F. 2d 969 (C.A. 2, 1930), which analyzed the history of the predecessor statutes. Judge Hand indicated Congress did not intend the duplication of legal personnel, considered the cost, and centered the responsibility for the conduct of public litigation in the Attorney General (*Id.*, at 970). Judge Hand stated that "no such system is capable of operation unless his powers are exclusive . . ." (*Ibid.*)

Petitioner contends that statutes should not be construed to lead to injustice, oppression or absurd consequences. There can be no serious quarrel with this rule of statutory construction. On the other hand, the cases cited by petitioner state an even broader principle that is applicable here: that is, when the intent is plain nothing is left to construction or, stated alternatively, courts should not attribute meanings inconsistent with the clear statutory language. See *Holy Trinity Church* v. *United*

States, 143 U. S. 457, 459 (1892) and *United States* v. *Kirby,* 7 Wall 482, 486 (1968). It is respectfully submitted that there are no ambiguities in the statutes; they simply provide that when a public question is involved or an official act is being reviewed, the official should be represented by the Attorney General or his appointee. In the memorandum previously submitted by respondent in opposition to the petition for certiorari, he stated the cases showing that the failure to have the Attorney General or his appointee represent the involved governmental agency results in a failure of jurisdiction.

Respondent wishes to take this opportunity to point out a significant error in the Petition for a Writ of Certiorari under the heading "REASONS FOR GRANTING THE WRIT" at page 13. Petitioner stated: "The basic underlying facts with respect to Nolan's continued participation in the reorganization after his law firm had submitted a plan on behalf of a principal client of the firm were undisputed." This statement is totally incorrect as was clearly demonstrated in the Appellate Court opinion. The Court stated as follows:

> "Thereafter New York counsel appeared for Schiavone and Nolan continued to represent the trustee in a substantial amount of day to day legal work unconnected with reorganization plans." (A5)

Respondent does not wish to burden this reply memorandum with a wealth of factual detail which demonstrated that neither he nor his firm had any participation in the reorganization plans and definitely did not represent Schiavone in connection with their reorganization plan as the record adequately establishes this fact; and it is difficult to conceive how petitioner could have permitted this misstatement to be made in its petition.

CONCLUSION

For the reasons stated herein and in the brief previously filed by respondent, the Writ of Certiorari should be denied.

Respectfully submitted,

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